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No. 06-803

IN THE

Supreme Court of the United States

JOHN DAMON, AN INDIVIDUAL, PETITIONER

v.

AIR PACIFIC LTD. AND QANTAS AIRWAYS LIMITED.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an issue of international importance for protection of air travelers, including United States citizens traveling abroad, not addressed by this Court in *Olympic Airways v. Husain*, 124 S. Ct. 1221 (2004):

> Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

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Petitioner seeks review of the opinion rendered herein by the United States Court of Appeals for the Ninth Circuit which is unpublished is the Ninth Circuit No. 03-56838. A copy of the Memorandum is reproduced in the Appendix as, (1a-3a)[1]. The order of the United States District Court for the Central District of California is unreported. A copy of the document is reproduced in the Appendix as, (4a-10a).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on October 2, 2006. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Convention for the Unification of Certain Rules Relating to International Transport by Air, Oct. 12, 1929, 49 Stat., part II, p. 3000, TS No. 876 (1934), reprinted in 49_U.S.C. § 40105 (1997) ("The Warsaw Convention or Act")[2]

Article 17 or the Warsaw Act states:

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[1]Citations to the Appendix to the Petition as _a.

[2]The Warsaw Convention has been amended by the Agreement Relating to the Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, signed at Montreal on 25 September 1975, ratified by the United States 1998 reprinted in S. Exec. Rep. No. 105-20 (1998). These amendments do not affect Article 17.

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24(1) of the Warsaw Act states:

In the cases covered by articles 18 and 19 any action for damages, however unfounded, can only be brought subject to the conditions and limits set out in this Convention.

Article 24(2) of the Warsaw Act states:

In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

STATEMENT

During the course of Air Pacific Flight 811 that departed at 10:00 p.m. on December 3, 2000 from Los Angeles, California, bound for Nadi, Fiji, Appellant, John Damon, developed extensive deep vein thrombosis ("DVT"), resulting in pulmonary emboli.[3]

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[3]Deep Vein Thrombosis (DVT) and its associated condition, venous thromboembolism are extraordinarily dangerous conditions associated with high morbidity and mortality. In fact, the World Health Organization considers the risk of DVT associated with long duration air travel, to be so significant that it has commissioned an international study of that health hazard and how

Upon arrival at Nadi on December 5, 2000, Mr. Damon felt chest pain and shortness of breath. Unbeknownst to him, he was experiencing the effects of pulmonary emboli caused by DVT he developed due to cabin conditions on the Air Pacific flight. His condition seemed to improve somewhat and later that day he boarded a Qantas flight No. 921 bound for Brisbane, Australia. Upon arrival at Brisbane, his condition worsened, requiring hospitalization. He was determined to have developed DVT during his flights and suffered pulmonary emboli as a result.

At no time before December 3, 2000 had the Petitioner ever heard of DVT being associated with long duration air flight. Neither did he know prior to his flight that his past medical history, coupled with the conditions in the aircraft could cause this life threatening medical condition. At no time prior to, or during the flight did Respondents, Air Pacific or Qantas, advise him, orally or visually, about the risk of DVT created by long duration flight. At no time prior to, or during the flight did the Respondent inform the Petitioner of reasonable steps that he could have taken to avoid the DVT risk. Therefore, not only was he unaware of the risk, but, when it developed, he did not have sufficient information to inform the carriers about his medical situation.

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to reduce the risk. (*See also*, T.N. Bettes, M.D. and D.K. McKenna, M.D. Medical Advice for Commercial Air travelers, *American Family Physician*, Vol. 60, pp. 801-10 (September, 1999); Medical Advice for Airline Passengers, *Aerospace Medical Assoc.*, at Page 11 (May, 2002); R.S. Hughes, M.D., et al., Frequency of Venous Thromboembolism in Low to Moderate Risk Long Distance Air Travelers, the *New Zealand Air Travelers Thrombosis Study*, The Lancet, Vol. 362, pp. 2039-44 (January, 2003).

Both carriers claim to have advised passengers about the risk they faced of developing DVT in flight. They chose to hide what scant "information" they did provide in the back of their in-flight magazines. It is undisputed that passengers on the flights were not advised to turn to the back of the airline magazines to receive any information about DVT that could save their lives. Indeed, the Air Pacific magazine does not even mention DVT. By the time he boarded the Qantas flight, Mr. Damon already developed the life-threatening condition. Qantas, however, failed to give Mr. Damon any information that could have clued him to advise cabin personnel that he was in distress due to a flight-related medical condition.

Long before these flights, air carriers generally, and Qantas specifically, knew that international travelers were especially at risk for developing DVT in flight. Since 1954 reports in the medical literature have linked air travel with DVT and pulmonary embolism. Medical studies have found an increased incidence of DVT among passengers who have recently flown, perhaps in as many as 1 in 10. Conditions contributing toward the increased susceptibility to DVT include: immobility in flight; decreased air pressure; relative hypoxia in the flight cabin and dehydration.

The danger of developing DVT during long duration flights was also long known by the International Air Transport Association ("IATA"), which is the international commercial aviation industry's trade organization of approximately 275 members, including the Respondent. In 1986, IATA recommended that its members give warnings to passengers specifically addressing the risk of DVT. A manual distributed by IATA to its members mentioned that "prolonged immobilization on long flights has a

noticeable effect on the circulation, especially in the lower limbs." Because "the opportunity for physical exercise is very limited," since aircraft "aisles will be blocked most of the time by cabin personnel serving passengers," IATA recommends that its members encourage their passengers to "take every opportunity to exercise" especially "during intermediate stops." IATA's 1986 recommendations, however, went even further: "During flight, passengers should be encouraged to move their feet frequently and exercise the muscles of the legs. when possible, to minimize ankle and feet swelling, the passengers should stand and walk the aisles for a few minutes every hour or so and to elevate the feet as high as possible while sitting."

In 2001, IATA again instructed its member carriers to inform travelers of the risks of DVT when a reservation is booked. IATA also again encouraged carriers to remind passengers - just before boarding and while on board - to drink sufficient fluids, wear loose-fitting clothes, avoid smoking and alcoholic beverages, and perform physical exercises in their seats (particularly for their feet and legs).

Although airlines have known that their operations exposed their passengers to the DVT risk for at least 30 years, some are just now beginning to warn passengers of that danger. Indeed, Qantas has claimed that it was not until 2001 that it began to provide video warnings to its passengers about the DVT risk. Unfortunately, prior to that time, for whatever reason, Air Pacific and Qantas decided not to provide any such informational video or other announcement to passengers about the DVT risk.

Mr. Damon was not told by Air Pacific to read page 72 in its on-board magazine. Even if he had, there was nothing on that page that would have informed him

about DVT or that he was at risk. Even if Qantas had told him to search back to page 163 of its magazine for vital health information, which it didn't, there was no information provided that would have alerted Mr. Damon that he should advise cabin personnel that he was suffering from a flight-related medical condition. The carriers here claim that at the time of these flights it was their policy to warn passengers of the DVT risk. Since the purported warning was never actually given to or received by Mr. Damon, the Respondents violated their own alleged policies and as a result, the Petitioner suffered a disabling, life-threatening medical event during the course of these flights that continue to cripple him.

Petitioner brought suit in Federal District Court seeking relief under Article 17 of the Warsaw Act. The District Court entered judgment in favor of Respondent, ruling as a matter of law that DVT could not be construed an "accident" under Article 17. In denying the Petitioner any relief for the serious, permanent injuries he sustained due to Air Pacific's and Qantas's operations, the District Court purports to rely upon a definition of "accident" under Article 17, that it believes was adopted by this Court in the 1985 opinion of *Air France v. Saks*, 470 U.S. 392, 404 (1985). Although left undefined in the Act as drafted in 1929, this Court has consistently opined that the purpose and intent underlying the Act required that a compensable "accident" be an "unexpected or unusual event or happening that is external to the passenger." This Court recognized that where international carriers' failure to act in information in their possession causes injury to a passenger, the Warsaw Act will afford relief.

The District Court erroneously analogized Petitioner's disabling injury to that addressed in *Saks*,

because the flight took off, flew, and landed as planned. Under this faulty paradigm, if a passenger suffers an injury causally related to the carrier on a otherwise "normal" international flight, an "accident" may only be found if that passenger informed a crew member of a health concern before he or she is stricken, and then only if the crew member's response to that information violates a "clear" industry standard or policy. However, this requires that the passenger already know that by taking the flight he or she is exposed to a potentially fatal risk, and herein lies the whole point of the DVT litigation domestically and internationally. Appellant did not know he was at rick because Air Pacific and Qantas decided not to tell him.

The record here is entirely distinguishable from the facts in *Saks*. In *Saks*, the airline had no prior knowledge or reason to suspect the particular, undisclosed idiosyncratic needs of a single passenger. Accordingly, it would not be considered objectively "unusual" or "unexpected" if a carrier failed to act upon information it neither had nor had reason to anticipate. In this case, Air Pacific, Qantas and the rest of the international air carrier industry knew of the hazard to all their passengers but failed to meaningfully provide information concerning that hazard to the passengers on the flight.

The Ninth Circuit appellate panel failed to provide any meaningful analysis of the present case. The Panel merely adopted the holding in *Caman v. Continental Airlines*, 455 F.3d 1087 (9th Cir. 2006). The Panel discounted the *Caman* decision as not being factually based, but rather instructive on the definitions of the term "event" under Article 17. The Panel declined to look at specific facts that would result in a different conclusion in the Petitioner's case. The Ninth

Circuit, further, did not address the distinctions between "omission" and "commission" it had made when defining "event."

The facts here presented are analogous to those reviewed in this Court's pronouncement in *Olympic Airways v. Husain*, 124 S.Ct. 1221 (2004). There, an individual crew member was made aware of a single passenger's particular sensitivity. The issue there concerned whether an omission (e.g. carriers' failure to respond to information) could satisfy the requirements of an "unexpected" or "unusual" event or happening. Here, an entire industry has ignored information in its possession reflecting a risk it is exposing its passengers to each day. Air Pacific and Qantas failed to meaningfully implement any real response to that information. A majority of this Court, in *Husain*, found absolutely no distinction under Article 17 between carrier *acts* and *omissions*, if passenger injury results.

The discussion in *Husain* addressed a record that presumed the existence and breach of an "industry standard and airline policy." Similarly, the record here contains substantial evidence that a violation of industry standard and the carriers' alleged policies to warn was causally related to a passenger injury. However, the same conclusion would result following the *Husain* analysis, if Respondents and/or the carrier industry had failed to develop or implement a responsive standard or policy. Such a scenario must logically be considered to be objectively "unexpected" or "unusual" since the carrier industry had specific information, but decided not to act. Certainly from the innocent injured passenger's perspective, a carrier's failure to take action to obviate a risk it was aware of, whether due to violation of policy or intentional decision not to develop a program, would be both

"unexpected" and highly "unusual."

It is respectfully submitted that the Ninth Circuit's ruling does not comply with either the purpose or the intent of the Act, and contravenes this Court's admonition concerning how the term "accident" used in Article 17 should be construed. The decision allows Respondents to escape responsibility notwithstanding the fact that their operations and decisions were shown to have had a causal connection to serious passenger injury. The Ninth Circuit has turned its back on a fare-paying passenger, who was severely injured because of the Respondents' operational decisions, and left Mr. Damon without remedy. Such a ruling is at odds with a reasonable and "flexible" application of the term "accident' utilized in the Warsaw Act.

The record provided substantial unrebutted evidence establishing a connection between the Petitioner's injury and Respondent's operation. The Ninth Circuit failed to view the evidence in light most favorable to the Petitioner, and could not weigh the parties' evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 245 (1986). The case should be submitted to the trier of fact for resolution.

REASONS FOR GRANTING THE PETITION

I. IT IS IMPORTANT FOR THIS COURT TO DETERMINE THAT THE AIR CARRIERS' FAILURE TO FOLLOW IATA'S STANDARD AND AEROSPACE MEDICAL ASSOCIATION'S RECOMMENDATIONS TO MEANINGFULLY INFORM PASSENGERS OF A SERIOUS HEALTH RISK ASSOCIATED WITH CONDITIONS OF AIR TRAVEL, A RISK KNOWN TO THE CARRIER

BUT NOT PASSENGERS, IS AN UNEXPECTED OR UNUSUAL EVENT AS DEFINED BY *SAKS* UNDER ARTICLE 17 SO AS TO IMPROVE AIR CARRIER OPERATIONS AND PROTECT INTERNATIONAL PASSENGERS FROM THE HEALTH _ CONSEQUENCES OF CARRIER DECISIONS.

This Petition concerns an issue both of national and international significance regarding the application and scope of the term "accident" as used in the Warsaw Act, and directly questions whether the Act will continue to provide meaningful protection for the international air traveling public.

The question raised has global significance because the opinion of the Ninth Circuit potentially jeopardizes the safety of all passengers on international flights that fly from or arrive in the United States. The Ninth Circuit opinion undercuts the well-recognized fundamental purpose of the Act, to encourage safe flying environments on international flights, and to provide international passengers with compensation where a carrier's operations led to a passenger's injury. The purpose of the Act was not only to foster the development of, at the time, fledgling airline industry by achieving uniformity of rules governing claims, but also to balance the interests of injured passengers in receiving prompt recovery for personal injuries with the interest of carriers seeking to limit potential liability. *See, Generally,* Richard Gardner, "The Warsaw Convention at Three Score Years and Ten," 24 *Air and Space,* L. 114 (1999); *El Al Israel Airlines, Ltd. v. Tseng,* 525 U.S. 155, 169-170 (1999). The Ninth Circuit decision gives a Federal Court imprimatur to an

industry decision to withhold vital health and safety information from passengers, compounded by that industry's refusal to affirmatively act on a hazard about which most international passengers are ignorant.

Now, commercial aviation is an established industry and the countervailing balance of the international passenger's needs has changed. "Protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve." *Wallace v. Korean Airlines*, 214 F.3d 293, 296-297 (2d Cir. 2000). The Warsaw Act promotes passenger safety by ensuring that air carriers remain responsible for maintaining safe operations to benefit the welfare of their passengers. It is internationally recognized that airlines should have incentives to promote the safety and security of their passengers. *Maxwell v. Aer Lingus Ltd.*, 122 F.Supp.2d 210, 214 (D.Mass 2000); *Salerno v. Pan Am World Airways, Inc.*, 606 F.Supp. 656 (S.D.N.Y. 1985).

The subsequent amendments to the Act, embodied in the Montreal Accords, resulted in the signatory carriers consenting to a liability system under which they assumed "virtual strict liability" for death or injury to passengers. These amendments were made, in part, at the behest of the United States, aiming to assure our citizens of adequate protection in the event they sustain injury on an international flight. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34-37 (2d Cir. 1975).

The United States, dissatisfied with the old liability limits, invoked Article 39 of the Convention and filed a notice of its intent to denounce the Act of 1965. Senator Robert F. Kennedy cogently articulated the concerns of the United States underlying its planned denouncement: "Over two million Americans

travel annually on international flights. Assuring that their families are adequately protected in case of accident is, consequently, a matter of wide-spread importance...no one questions the fact that the protection now afforded to international travelers is woefully inadequate." *Id.* At the conference in Montreal, in February 1966, one day before the United States denunciation was to become effective, a compromise was brokered. Within the compromise was an agreement on the part of the carriers to waive the "all necessary measures" defense. *Id.* As a result, the Act is now seen as affording protection for all passengers from hazards of air travel, spreading the cost of that protection among them. *Id.* at 36-37. By waiving the defense of due care, liability under the Act had become considered strict under modern tort theories, although not totally absolute. *Fulop v. Malev Hungarian Airlines*, 175 F.Supp.2d 651 (S.D.N.Y. 2001).

Thus, the passenger protection purpose of the Act, and the public policy considerations it serves, form an integral part of the analysis regarding the proper scope and application of the Act. An evaluation that ignores these subsequent developments of the Act would revert the Act to its 1929 incarnation, at the infancy of air travel, and ignore new dangers posed to air travelers fostered by technological changes in the industry over the intervening 77 years. Today, millions of people annually experience commercial air travel at altitudes exceeding 30,000 feet for periods longer than 16 hours. The risks of aviation have changed dramatically in ways unforeseeable in 1929 by the Warsaw Convention delegates. Nonetheless, the original drafters intended to create and created a system of liability and compensation rules to cover all

hazards of air travel. *Day v. Trans World Airlines, supra*, 528 F.2d at 38.

The Ninth Circuit Panel erroneously decided that the DVT suffered by Damon did not result from an "event." The Panel decided that Respondents' failure to warn was not an "event" as defined in *Saks* and *Husain*. If a passenger falls victim to a medical condition on an international flight, an "accident" will be found where a crew member or the air carrier acted in an affirmative way to cause the injury, or had stood by with knowledge that the injury will occur. *Olympic Airways v. Husain, supra*, 540 U.S. at 655. Strangely, the Panel did not address whether the Respondents' failure to follow the industry standard established by IATA and the Aerospace Medical Association during an international flight, that results in injury, is "unexpected" or "unusual." The Petitioner, like many other passengers, was unaware of DVT risk before boarding the flights. Due to Air Pacific's and Qantas' affirmative decision not to follow prevailing standards and their own policies, Petitioner was precluded from learning about the risk of DVT, and how to avoid it.

The Panel ignores the holding in *Rodriguez*, which found significance in the absence of evidence in that record concerning an industry standard requiring that international passengers be given DVT warnings. The record here is distinguishable from the facts in *Rodriguez*. In the present case, the airlines not only had prior knowledge that its flight conditions led to the suffering of DVT by its passengers, but were directed to issue warnings to international passengers of the dangers of DVT prior to the flight by IATA and by the Aerospace Medical Association. Moreover, the avowed "policy" of the Respondents was to provide DVT risk information to its passengers. Accordingly, in

Rodriguez, the court could not address whether it was "unusual" or "unexpected" for a carrier to not issue a warning to its passengers, when the industry standard was to do so. The Ninth Circuit in *Rodriguez* was not presented with evidence that the carrier failed to comply "with industry practice at the time." *Rodriguez v. Ansett Australia, Ltd., supra*, 383 F.3d at 919.

The Respondents knew of the risk of DVT that all of its passengers faced. They claimed it was their policy to inform passengers of the DVT risk associated with conditions of long duration air travel. Yet, despite having this information and being aware of the directives, the airlines nonetheless, affirmatively and unexpectedly declined to warn its fare paying passengers about this risk by placing the information where it can be easily found. Accordingly, the record presented establishes that an affirmative failure, indeed a refusal, to follow this standard was unusual among other international air carriers, as the common practice at the time was to issue DVT warnings to passengers on international flights.

Further, the Respondents' own decision to provide passengers with DVT information reflects a conscious decision by the airlines to implement a policy. However, the airlines actual failure to effectively deliver the DVT warnings to their target - the passengers - shows a failure of the Respondents to carry out their implemented policy. Thus, the Respondents' failure to comply their own policy, is inline with the *Rodriguez* holding that a finding of an "accident" will result. *Rodriguez v. Ansett Australia, Ltd., supra*, 383 F.3d at 919.

Determination of standards by silence was rejected by the this Court. *Olympic Airways v. Husain, supra*, 540 U.S. at 656. This Court used an

example of a passenger who collapsed and stopped breathing, but his failing to advise the airline that he needed help does not preclude the airline from refusing to give aid, despite the fact that no such Federal regulation exists. *Id.* If a danger to passenger's health exists, and the air carrier, but not the passengers know about it, the air carrier should disclose that danger in a meaningful manner designed to get that information to the passengers, especially when a standard exists among the international air carrier industry to do so.

As previously examined by this Court, Federal Aviation Regulations do not preempt the entire field of aviation safety. *Charas v. Transworld Airlines, Inc., supra*, 160 F.3d at 1265. On the contrary, the FAA only promulgates minimum standards. Thus, state regulation also plays a role in air safety. See, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (2000). By the same logic, should the international air carrier industry decide to self regulate and impose stricter standards than the mere minimum, it is free to do so. Thus, IATA's decision to mandate that DVT warnings be given to international air passengers should be enforced as a clear industry standard. A passenger expects that an air carrier will follow safety directives promulgated by the industry trade association, and failure of Respondents to do so here was "unexpected" and "unusual."

To find the standards of international air travel it would be more appropriate to look at an international organization's directive. IATA, as the trade organization for international air carriers, better understands the realities of international air travel, and as such is best capable of setting forth appropriate warning to be given to international air passengers. The court should look to the international air travel

standards to determine that a failure to follow the standards was an "unexpected" or "unusual" departure, and thus an Article 17 accident.

This Court should take the opportunity to reinforce the protective aspects of the Warsaw Act by holding carriers responsible under Article 17, when it is shown that their decision to withhold information from the traveling public was contrary to industry guidelines and resulted in a passenger suffering a serious bodily injury.

II. THE RESPONDENT'S FAILURE TO FOLLOW IATA'S DIRECTIVE AND THEIR OWN IMPLEMENTED POLICIES OF WARNING ITS PASSENGERS ABOUT THE DVT RISK RESULTING FROM CONDITIONS ON BOARD AN INTERNATIONAL FLIGHT IS A CONDITION EXTERNAL TO THE CONTROL OF THE PASSENGER, WAS AN "EVENT" THAT RESULTED IN AN ARTICLE 17 "ACCIDENT."

This Court has interpreted "cause" to be expansively construed, requiring only some link in the injury producing "unusual" or "unexpected" event external to the passenger. *Saks*, *supra*, 470 U.S. at 406; *Maxwell v. Aer Lingus*, 122 F.Supp.2d 210, 211, n.2 (D.Mass. 2000).

The Petitioner was unaware of the risk of DVT on the Respondents' flights. As a result, he suffered DVT. "All injury is the product of a chain of causes" and the passenger need only prove "some link in the chain was an unusual or unexpected event external to the passenger." *Air France v. Saks*, *supra*, 470 U.S. at 406. The air carrier's awareness of dangerous flight conditions and lack of response to them, not the

passenger's sensitivity to cabin conditions, are determinative in a causation analysis. *Olympic Airways v. Husain, supra,* 540 U.S. 644.

Here the carriers were unquestionably aware of the risk it was exposing its passengers to. Air Pacific and Qantas knew that the information they had was vital in prevention of DVT in passengers. Air Pacific and Qantas knew they should disseminate that information to its passengers, as its own trade association directed that DVT warnings be provided. Instead, the Respondents took an easy way out and placed a small warning in the back of an inflight magazine. By having an inconspicuous warning, the Respondents ignored the directive, and as a result the Petitioner suffered DVT.

The Panel creates a conflict between this Court's holdings in *Saks* and *Husain*, the Ninth Circuit's own decision in *Rodriguez*, and the Fifth Circuit's holding in *Blansett*. The Ninth Circuit Panel cited its own decision in *Caman v. Continental Airlines*, 455 F.3d 1087 (9th Cir. 2006), that attempted to carve out unprecedented distinctions between terms "omission" and "commission" while defining "accident." The Panel's reliance in its opinion upon the Fifth Circuit decision in *Blansett* and its opinion in *Rodriguez*, is improper in its conclusion of what constitutes an "inaction," holding that present case did not constitute an Article 17 "event." The Panel in the present case refers to an event that qualifies for Article 17 compensation as "*commission*", or an "inaction that produces an effect, result or consequence."

Rodriguez, unlike *Caman* did not make a distinction between different types of inactions, only stating that if a standard to warn exists, then action on the part of the air carrier is required. In *Saks*, the

airline did not fail to act in any way, as it had no knowledge or notice of a single passenger's internal reactions to flight conditions. Here, a standard to warn existed, the carriers chose not to follow it meaningfully, and injury resulted. This Court never addressed whether a distinction should have been made, based on a type of inaction.

Even using the Ninth Circuit Panel's strange and previously unheard of distinctions of different definitions in *Caman* of "event," a "*commission*" by Air Pacific and Qantas occurred. In the present case, "*commission*" is not an individual crew member's failure to act on information in order to avoid causing injury to a passenger, but rather an airline-wide policy of not providing important, injury-preventing, safety information to its passengers, including those who may be unknown to them, more at risk from DVT. Air Pacific and Qantas did not merely "omit" to act to warn its passengers of DVT risk. Instead, they acted by placing a small warning hidden from the passengers, in the back of the in-flight magazine. Thus, Air Pacific and Qantas affirmatively failed to give a proper warning. Unlike an "omission" where no conscious decision to act occurred, here an affirmative "*commission*" deprived Damon of the information he could have used to protect himself. The risk would have been significantly decreased had Air Pacific and Qantas simply instituted gave its passengers clear information on where they can learn about DVT risk, instead of hoping they stumble on it in the back pages of the in-flight magazine. Instead, Air Pacific's and Qantas's "*commission*" of failing to warn of DVT risk resulted in Petitioner's injury. It's failure to take steps to warn of that risk is no different, legally or philosophically, from a crew's refusal to reseat a

sensitive passenger.

The carriers acknowledged that DVT information should be provided to passengers. In fact, both Qantas and Air Pacific developed and implemented policies to provide the DVT risk information to its passengers. However, they chose to warn through ineffective media of an in-flight magazine, rather than through effective media that had been asked to employ, such as on-board oral warning. Therefore, the policy implemented by both air carriers was ineffective. The Respondents' affirmatively acted to implement a DVT warning program. However, the Respondents did not effectively deliver those warnings. The failure by the carriers to follow their own implemented policy of delivering effective DVT risk warnings to their passengers, constituted a "commission" as defined in *Caman*. Therefore, the failure of the Respondents to effectively warn constitutes an "event" for the purpose of finding an Article 17 "accident."

Manifestly, the condition on which *Caman's* holding was predicated, that the putative accident concerned an act of "omission" is not present in the instant case. The "accident" here is not merely a bare failure to warn, but rather the intentional decision to use ineffective media to deliver warnings. Particularly, since carriers use effective media, such as the oral warnings, to advise passengers of other important information to protect their safety, *Caman*'s logic could stand for the proposition that a jury could find it unusual or unexpected for the airlines to have warned about DVT risks and prophylaxis through ineffective media.

Air Pacific and Qantas do not dispute that it was aware of how its operations were leading to DVT-

related injuries and deaths to a significant number of international travelers annually. The Panel's opinion analytically does not separate its decision from *Caman*, where it called the failure to warn a mere "*omission*", or "inaction that idly allows an unfolding series of event to reach their natural conclusion." To call a failure to warn of a life-threatening condition a mere "*omission*" is not logical. A passenger does not board an international flight, expecting a natural outcome of the flight to be his development of DVT. Further Air Pacific and Qantas did not merely idly stand by. They took ineffective action to warn, while knowing that they created conditions on its flight that lead to development of DVT. To counterbalance the on-board cabin environment, all the airline had to do was to provide an adequate warning to its passengers, as prescribed by IATA. A conclusion of a mere "*omission*" should not result when uncontroverted facts urge and demand that positive steps be taken to remedy the danger of DVT.

The carrier knew that passengers were at risk for DVT, and they knew how to prevent DVT from occurring in this case, just as the crew knew of the risk to the passenger in *Husain*. The failure to act on that information is unquestionably an important link in the causal chain that resulted in the Petitioner developing a life-threatening medical condition. Excluding the circumstances here presented from the penumbra of Article 17 will be entirely inconsistent with the overall scheme of the Warsaw Convention.

The Panel failed to interpret the standard for an international air carrier requiring to take affirmative action, in *Husain*. Additionally, the Panel did not properly address the definition of "omission" or "inaction" as defined in *Husain*. The Panel did not

include in its opinion analysis of an industry standard, required in *Rodriguez* to result in Article 17 liability.

The Panel also factually ignored in its opinion, the Air Space Medical Association's publication of its guidelines describing how carriers should address the risks airline passengers. Lastly, the Panel made no mention of the DVT risk warning standards promulgated to its members, including Respondents, by IATA.

Rehearing is necessary to assure these important issues and facts are not overlooked. If rehearing on these issues is denied, Petitioner respectfully urges rehearing be granted *en banc* so that these important issues be properly addressed.

CONCLUSION

In order to protect the safety of international air travelers, to secure uniformity as to this important issue of international law and to resolve important conflicts between the decision below and the decisions of other Circuits as well as this Court, plenary review is in order.

Respectfully submitted,

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No. 03-56838

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN DAMON, an individual, Plaintiff-Appellant,

v.

AIR PACIFIC LTD. and QANTAS AIRWAYS LIMITED., Defendants - Appellee.

September 26, 2006, Submitted, Pasadena, California

October 2, 2006, Filed

COUNSEL: Clay Robbins III, Magaña, Cathcart & McCarthy, Los Angeles, California, for the appellant.

Rod Margo, Scott Cunningham, Condon & Forsyth LLP, Los Angeles, California, for the appellees.

JUDGES: Before: D.W. NELSON, HAWKINS, and PAEZ, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Plaintiff John Damon appeals the district court's grant of summary judgment to defendants Air Pacific Ltd. and Qantas Airlines Limited. We affirm.

Damon first argues that this court wrongly decided Rodriguez v. Air New Zealand, 383 F.3d 914, 916-19 (9th Cir. 2004), which held that the development of deep vein thrombosis ("DVT") was not an "accident" as that term is used in Article 17 of the Warsaw Convention. Damon contends Rodriguez is inconsistent with the Supreme Court's decision in Olympic Airways v. Husain, 540 U.S. 644 (2004). In Rodriguez, however, we fully considered and distinguished Husain, 383 F.3d at 918, and, moreover, as a three-judge panel, we lack the authority to disregard Rodriguez.

Damon next argues that the airlines should be liable under the Warsaw Convention because their failure to warn of the risk of DVT is an "accident," that is, "an unexpected or unusual event." See Air France v. Saks, 470 U.S. 392, 405-06 (1985). We recently rejected this argument in Caman v. Continental Airlines, 455 F.3d 1087 (9th Cir. 2006). In Caman, we explained the difference between the "accident" requirement of Article 17 and the defenses available to a carrier under Article 20(1) when a carrier has "taken all necessary measures to avoid the damage":

Attributing liability to an air carrier for failing to do all it can to prevent an injury that is inherent in air travel...improperly shifts the focus of the inquiry from the nature of the event which caused the injury to the alleged failure of the air carrier to avert the same. In addition, interpreting the term "accident" to include a failure to warn of a possible risk of flight would incorporate into Article 17 an inquiry that is properly left to analysis under Article 20(1) once it has been

established that an accident occurred.

455 F.3d at 1092. We went on to conclude that the failure to warn of the DVT risk is not an Article 17 "event." Id.

Although Damon argues the factual record in his case differs from the facts in Caman, nothing about the holding in Caman is tied to its specific evidence. Rather, the decision turns o the interpretation of two different provisions of the Warsaw Convention, and the nature of the alleged act of omission. See id. Damon's reliance on footnote four of Caman, 455 F.3d at 1091 n.4, is thus misplaced. Although in Caman we declined to address the general question of whether an air carrier's departure form an industry standard or its own company policy is "unexpected" for the purpose of defining an Article 17 "accident," we specifically concluded that a failure to warn of the risk of DVT is not an "event" for Article 17 purposes. Id. at 1092. If no "event" has occurred, it matters not whether that non-event is "unusual or unexpected." Even though Caman may leave open a question for another day in another context, it definitely resolves the DVT failure to warn issue, and in a way that is fatal to Damon's claim.

AFFIRMED.

Case No. CV 02-5307-JFW (Shx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN DAMON -v- AIR PACIFIC, et al.

September 5, 2003, Decided

September 8, 2003, Entered

COUNSEL: For John Damon, Plaintiff: Clay Robbins III, Magaña Cathcart & McCarthy, Los Angeles, California

For Air Pacific Ltd. and Qantas Airlines Limited, Defendant: Rod Margo, Scott Cunningham, Condon & Forsyth LLP, Los Angeles, California

JUDGE: PRESENT: HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

OPINION BY: JOHN F. WALTER

OPINION: CIVIL MINUTES - - GENERAL

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On July 25, 2003, Defendant Air Pacific Ltd. ("Air Pacific") filed a Motion For Summary Judgment. On August 4, 2003, Plaintiff John Damon filed his opposition. On August 18, 2003, Defendants filed a Reply. The Court found the matter appropriate for

submission without oral argument. *See* Local Rule 7-15 (the Court may dispense with oral argument on any matter unless otherwise required); Fed.R.Civ.P. 78. The matter was, therefore, removed from the Court's August 25, 2003 hearing calendar and the parties were given advance telephonic notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Facts and Procedural Background

On December 3, 2000, Plaintiff traveled from Los Angeles, California to Nadi, Fiji aboard an Air Pacific flight (the "Air Pacific Flight"). (UF ¶ 2.) On December 5, 2000, Plaintiff traveled from Nadi, Fiji to Brisbane, Australia aboard a Qantas flight (the "Qantas Flight"). (Id.) Plaintiff planned on traveling to Australia in order to spend the Christmas holiday with his family who was residing in Queensland, Australia. (Id. at ¶5.) On the Air Pacific Flight, Plaintiff was seated in the business class section of the aircraft. (Id. at ¶6.) The flight lasted approximately ten hours. (Exh. C tp MArgo Decl.) Although there was turbulence during the Air Pacific Flight, the aircraft and its component systems functioned properly and there was nothing unusual about the operation of the aircraft during the Air Pacific Flight (Id. at ¶¶ 9-12.) The Qantas Flight lasted approximately three hours. (Id. at ¶ 14.) There was no business class section on the Qantas Flight, and Plaintiff was seated near the front of the aircraft. (Id.) Plaintiff presented no evidence that there was anything unusual about the operation of the aircraft during the Qantas Flight.

Although Plaintiff claims he developed pain in his chest and back and shortness of breath while

traveling from Los Angeles to Brisbane on the Air Pacific and Qantas flights, he made no complaints of physical pain to any Qantas or Air Pacific employees upon arrival in Brisbane. (Id at ¶ 15 & 17.) After deplaning in Brisbane, Plaintiff went to a hospital where it was determined that Plaintiff had deep vein thrombosis ("DVT") and a pulmonary embolism. (Id. at ¶ 16.) DVT is a condition in which a blood clot forms in the deep veins of the legs. (Scurr Decl. ¶ 11; Exh. 13 to Robbins Decl.) Complications occur when the clot, or part of it, which has formed in the veins breaks away or "embolizes" from the wall of the vein in the legs. (UF ¶ 19.) If the embolus reaches a blood vessel through which it cannot pass, it blocks the vessel. (Id.) Such a blockage is called an embolism. (Id.) Acknowledged predisposition factors of DVT include long periods of immobility, prior incidence of DVT, and dehydration. (Id at ¶ 20.) Plaintiff had at least one prior incidence of DVT and pulmonary embolism in May 1997, when Plaintiff was residing in New Zealand. (Id. at ¶¶ 21 & 22.)

Both Qantas and Air Pacific provide all passengers on all flights with in-flight magazines. (Fantasha Decl. ¶ 4; De Rome Decl. ¶ 3.) The December 2000 issue of Qantas' in-flight magazine, "The Australian Way," which was available to Plaintiff on his flight to Nadi, provides as follows:

BLOOD CIRCULATION/MUSCLE RELAXATION
When you're sitting upright in a stationary position for a long period of time, several things can happen:

- The central blood vessels in your legs can be compressed, making is more difficult for the blood to get back to your heart.
- The long inactivity of your body muscles in this

position can result in muscle tension, backaches, or a feeling to excessive fatigue during, or even after your flight.

- A stationary position inhibits the normal body mechanism for returning fluid to the heart, and gravity can cause the fluid to collect in your feet. This results in swollen feet after a long flight.
- Some studies have concluded that prolonged immobility may be a risk factor in the formation of clots in the legs. Particular medications and medical conditions may increase the risk of formation of clots if associated with prolonged immobility.

We recommend that you:

- Move your legs and feet for three to four minutes per hour while seated and move about the cabin occasionally. (Exh. A to De Rome Decl.)

The December 2000 issue of Air Pacific's in-flight magazine, "Islands," which was available to Plaintiff on his flight to Brisbane, provides as follows:

Sitting in a stationary position for extended periods can affect blood circulation, result in muscle tension, backaches and a general feeling of fatigue. Cramped seating positions can also result in fluid pooling in the lower extremities which causes swollen feet after a long flight. The best way to deal with these problems is to do light exercises. For your convenience you will find a range of suitable exercise pictures on these pages which are designed to encourage a safe way to enjoy movement, and stretch certain muscle groups that can become stiff as a result of long periods of sitting. (Exh. A to Fantasha Decl.)

II. Standard

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c) The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 256 (1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

An issue is genuine if evidence is produced that would allow a reasonable jury to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.* 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment;

rather, the nonmoving party must introduce some significant probative evidence tending to support the complaint." *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (internal quotations omitted).

In ruling on a summary judgment motion, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson* 477 U.S. at 249. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions..." *Id.* at 255.

III. Discussion

Plaintiff argues that Qantas and Air Pacific should have warned him about the risks of developing DVT and that their failure to warn constituted an accident for purposes of Article 17 of the Warsaw Convention. 49 Stat. 3000 (1934); T.S. 876 *reprinted in* 49 U.S.C. §40105. Article 17 of the Warsaw Convention provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Accordingly, in order to prevail on his complaint against Qantas, Plaintiff must prove that an "accident" was the cause of his injury. *Air France v. Saks*, 470 U.S. 392, 396 (1985). The United States Supreme Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at

405. In addition, the Court stated "when the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406.

In this case, there is no evidence that Plaintiff developed deep vein thrombosis from an unexpected or unusual event or happening that was external to Plaintiff. *See, e.g., Margrave v. British Airways*, 643 F.Supp. 510, 512 (S.D.N.Y. 1986) (holding that "extended sitting in an airplane, even in an uncomfortable position, cannot properly be characterized as the sort of 'accident' that triggers an airline's liability under the Warsaw Convention"); *Scherer v. Pan American World Airways, Inc.*, 387 N.Y.S.2d 580, 581 (1976) (finding "no 'accident' as a matter of law" where the plaintiff alleged "bodily injury (namely, thrombophelitis), resulting from merely 'sitting' aboard a Pan Am flight from Tokyo to California"). As a result, Plaintiff has failed to demonstrate that an "accident" was the cause of his injury as that term is used in the Warsaw Convention and defined by the Supreme Court in *Saks*.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendants' Motion For Summary Judgment.

IT IS SO ORDERED

The Clerk shall serve a copy of this Minute Order on all parties to this action.